BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaints by Oscar Anonuevo dated January 26, 1994, alleging discrimination in employment on the basis of handicap.

B E T W E E N :

Ontario Human Rights Commission

- and -

Oscar Anonuevo

Complainant

- and -

General Motors of Canada Limited; Pat Cowling; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada); National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada), Local 303 and Dave Freeman

Respondents

DECISION

Adjudicator : Mary Anne McKellar

Date : March 31, 1998

Board File No: 0053-95

Decision No : 98-007

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	John Judge and Elizabeth Pillon, Counsel
Estate of Oscar Anonuevo, Complainant	)	Edna Anonuevo, on her own behalf
General Motors of Canada Ltd. and Pat Cowling, Respondents	)	Jason Hanson, Counsel
CAW - Canada and its Local 303, Respondents	)	Lewis Gottheil, Counsel
Dave Freeman, Personal Respondent	)	Dave Freeman, on his own behalf

INTRODUCTION

This decision deals with preliminary motions by the Respondents, the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada ("the CAW") and its Local 303 ("Local 303"), and by the Respondents, General Motors of Canada Ltd. ("GM") and Pat Cowling, to stay or dismiss the complaints of Oscar Anonuevo ("the Complainant") dated January 26, 1994 ("the 1994 Complaints") as against these Respondents. These motions were opposed by the Ontario Human Rights Commission ("the Commission") and by the Estate of the Complainant. The Estate led no evidence, made no submissions, and was absent for portions of the hearing. The Respondent, Dave Freeman, although notified of these motions, took no position with respect to them and was only briefly in attendance at the hearing of them.

DECISION

The 1994 Complaints are dismissed.

STRUCTURE OF THE REASONS FOR DECISION

Almost every action taken in the processing of the Complainant's allegations of discrimination against these Respondents is being challenged in a pending judicial review application. All the parties appreciated the likelihood that a review of my determination with respect to these motions might be joined to that application. Because I am dismissing the 1994 Complaints, that review could be appellate rather than supervisory. That possibility has informed these reasons. In an effort to provide a comprehensive factual record to assist an appeal court in its consideration of whether to substitute its findings for mine, I have provided a more detailed review of evidence than may have been strictly necessary to support my reasons for allowing these motions. Unfortunately, this expansive approach makes these reasons more difficult to follow. I hope the "roadmap" provided below will assist readers.

A. THE MOTIONS

1. **The CAW and Local 303 Motion**
2. **The GM and Cowling Motion**

iii. Failure to Disclose/Particularize

iv. Allegations Respecting Events after 1990

v. Litigation

6. **Prejudice**

i. 'Discrete' v. 'Cumulative' Approach

ii. Prematurity

iii. Loss of Available Arguments

iv. Disposal of Documents

v. Death of Witnesses

vi. Death of the Complainant

vii. Cumulative Effect

7. **Can the Prejudice to the Respondents be Rectified?**

REASONS FOR DECISION

A. THE MOTIONS

1. The CAW and Local 303 Motion

By their Notice of Motion, the CAW and Local 303 seek an order declaring that the Board has no jurisdiction to entertain the 1994 Complaint against them, or, in the alternative, dismissing the 1994 Complaint as against them, or prohibiting the prosecution of the 1994 Complaint as against them because it constitutes an abuse of process. The CAW and Local 303 brought this motion without prejudice to the position asserted in their judicial review application that the Board of Inquiry is without jurisdiction to hear these matters. The following grounds for the motion are specified in the Notice of Motion:

> i. The unreasonable delay by the complainant in the assertion of his complaint against the National and/or Local Union.
>
> ii. The unreasonable delay by the Ontario Human Rights Commission in the assertion, processing, investigation, and adjudication of this complaint against the National and/or Local Union.

iii. The closure of the workplace in question, namely the General Motors Scarborough Van Plant on or about May 7, 1993, following an announcement made by the company to effect such closure years earlier.

iv. The disposal of relevant files, documents and material prior to the initiation of a complaint against the National or Local Union, as a result of, amongst other things, the closure of the workplace, and the union's in-plant offices.

v. The death of the complainant, Jim Gamsby, Tom McDonnell, former President, CAW-Canada Local 303 and Dr. Gee, physician to the complainant.

vi. The assertion of new allegations of misconduct against the National and/or Local Union, outside of the parameters of the complaint as filed.

vii. The failure of the Ontario Human Rights Commission to provide certain particulars as have been requested by the National and Local Unions.

viii. The delay in the issuance of a decision by the Board of Inquiry in connection with the respondent's preliminary objections regarding jurisdiction, the subsequent resignation of Adjudicator Naresh Agarwal [sic], and the failure of the Chair of the Board of Inquiry to exercise his jurisdiction to consider the jurisdictional arguments raised by the respondents.

ix. The inability of the respondent National and/or Local Unions to identify relevant witnesses/workers, their respective seniority, and job placement in connection with the assertion by the complainant and/or the Ontario Human Rights Commission that the complainant should have taken some (unidentified) person's job, out of line of seniority.

2. The GM and Cowling Motion

GM and Cowling brought this motion without prejudice to the position asserted in their judicial review application that the Board of Inquiry is without jurisdiction to hear these matters. In their Notice of Motion, GM and Cowling simply seek an order staying or dismissing the 1994 Complaint, and specify the following grounds:

1. The unreasonable delay by the complainant in the filing of this complaint.

2. The unreasonable delay by the Ontario Human Rights Commission (the "Commission") which includes, but is not limited to, the filing, processing, investigation, and adjudication of this complaint.

3. The prejudice caused to the Respondents by the delay, both in respect of the issues of liability and damages.

4. The direct communication by Commission counsel with the Respondents without the knowledge of the Respondents' counsel, the failure of the Commission counsel to offer any explanation for this conduct, and the refusal of Commission counsel to disclose whether Commission counsel has attempted to or in fact communicated with any other member of the Respondents' corporate organization.

5. The oppressive elements of the Commission's draft Statement of Facts dated March 14, 1995.

6. The allegations raised for the first time by the Commission against the Respondents subsequent to the complainant's death.

7. The failure of the Commission to provide adequate disclosure and particulars to the Respondents.

8. The prosecution and adjudication of this complaint by the Commission against Cowling when:

   (i) the particulars against him set out no violations of the Ontario *Human Rights Code*;
   (ii) no damage claim is made against Cowling; and
   (iii) the Commission is prepared to withdraw the complaint against Cowling if General Motors agrees to certain litigation conditions.

9. The prosecution and adjudication of this complaint by the Commission against General Motors in view of the tactical positions the Commission has taken with respect to Cowling.

10. The closure of the relevant workplace, namely the General Motors Scarborough Van Plant on or about May 7, 1993, and the subsequent destruction of the relevant workplace.

11. The disposal of relevant files, documents and material prior to the filing of the complaint against the Respondents.

11. The impossibility of identifying witnesses and interested parties, as a result of, *inter alia*, the delay and the closure and destruction of the relevant workplace.

12. The deaths of the complainant, Dr. Alexander Gee (physician to the complainant) and Jim Gamsby.

13. The delay in the adjudication and issuance of the Board's Interim Decision, the subsequent resignation of Adjudicator Naresh Agarwal, the referral of the complaint to a new adjudicator, and the failure of the Chair of the Board to exercise his jurisdiction to consider the jurisdictional arguments raised by the Respondents.

14. The referral of this complaint to the Board in violation of the principles of natural justice and procedural fairness.

B. THE FACTS

1. Evidentiary Basis for Findings of Fact

This recitation of the facts is based both upon the extensive documentary evidence filed, and on the testimony of the following witnesses: Bob Ryan, Local 303 Plant Chair; Richard Monteith, Supervisor, Labour Relations at GM's Scarborough Van Plant from 1988-1993; William Holder, a lawyer who assisted Commission Counsel in their preparation of the case while an articling student; and Valerie Pollak, the Commission Officer assigned to investigate the Complainant's various complaints.

Although only the 1994 Complaints have been referred to the Board, the grounds asserted by the Respondents in their Notices of Motion require me to examine events that occurred commencing in 1987, including the Commission's handling of the Complainant's previous complaint against GM and Cowling ("the 1990 Complaint"), even though that complaint has not been referred.

The following recitation of the background facts provides a contextual framework for the allegations raised in these motions. Some of the facts are uncontested. Areas of dispute are identified, but do not need to be resolved for the purposes of disposing of these motions. Nothing in these reasons is

to be construed as determinative of any substantive issue in dispute. Where I refer to documentary evidence, it is for the sole purpose of ascertaining the scope of the case on the merits. I appreciate that the authenticity, admissibility and cogency of the majority of the documentary evidence remain open to challenge at any hearing on the merits.

2. The Complainant's Employment in the Van Plant

GM is a manufacturer of automobiles. It employed the Complainant as a production worker on the assembly line in its Scarborough Van Plant commencing March 3, 1982. The Van Plant was described by Ryan as "a low tech plant for an industry that prides itself as being high tech". Its antiquated assembly line mechanisms were unique in North America.

The total number of employees in the Van Plant was approximately 2700. The terms and conditions of employment for production workers in the Van Plant were governed by collective agreements negotiated between GM and the CAW and its Local 303 ("the Master Agreement" and "the Local Agreement").

Paragraph 65 of the Master Agreement contains provisions respecting the placement of injured or disabled employees, who cannot perform their regular jobs, in different jobs within their capabilities, subject to restrictions on displacing workers with greater seniority. Company Statement No. 20, appended to the 1987 Local Agreement, addresses the administration of Paragraph 65 of the Master Agreement, and states ". . . the placement of such employees will not impinge upon the fundamental principles of seniority as outlined in the Collective Agreement". Ryan estimated that at any given time as many as 150 to 200 bargaining unit employees might be away from the plant due to illness or injury and awaiting placement.

The 1994 Complaint asserts that the Complainant suffered from heart disease which occasioned his absence from work from the summer of 1984 until the fall of 1985. Shortly thereafter he sustained a workplace injury and was absent from work for some time in connection with it. In April 1986 the Complainant returned to work. He was placed in a temporary desk job in a non-assembly line area,

the Material Control Department ("the Material Control Job"), a position which he occupied until the fall of 1987, when, the Complaint asserts, an employee with greater seniority exercised bumping rights. Subsequently several new jobs were created in the Material Control Department.

At the time of the Complainant's removal from the Material Control Job, he was subject to the following medical restrictions, which are recorded in his "Placement Recommendation" dated February 16, 1987:

> JOB WHICH DOES NOT REQUIRE FORCEFUL USE OF ARMS, WITHOUT HEAVY PUSHING OR PULLING AND NO HEAVY LIFTING 10 - 15 LBS LIFT LIMIT. (DAY SHIFT RESTRICTION REMOVED) FEBRUARY 16, 1987

In September 1987, after a job search in the Trim Department, the Complainant was assigned to an assembly-line job ("the Paint Touch-Up Job"), which he held for several months, but to which, in his Complaint, he attributed a number of medical problems. Nevertheless, the Commission, in its Particulars dated September 1, 1997, appears to concede that this job was appropriate in view of the Complainant's medical restrictions. Following a further period of sick leave, the Complainant returned to work on the assembly line in what was referred to as the "Front Dash Sealer Job".

In the meantime, on January 18, 1988, the Complainant's work restrictions, as set out in the "Placement Recommendation" were reviewed and continued for one more year.

The work area in which the Front Dash Sealer Job was performed was reorganized in the fall of 1988. In some of the documents furnished to the Commission by the Complainant he described the reorganization. Monteith, in testimony before me, also described the reorganization. Whatever its other effects may have been, it appears undisputed that one effect of the reorganization was to limit the Complainant's ability to work at a pace faster than the assembly line, that is to work several vehicles ahead of the line and then rest until the line caught up to him.

Several weeks after the reorganization -- that is in the late fall of 1988 -- the Complainant indicates in the Complaint that he "walked out of the job and refused to return unless [his] work area was put

back to its original arrangement". Although he remained a GM employee and received sickness and accident and long term disability benefits in accordance with the collective agreements, the Complainant never actually worked in the Van Plant again.

GM contended at the time, and also contends now, that the demands of the Front Dash Sealer Job both before and after the reorganization complied with the Complainant's medical restrictions. The documentary evidence indicates two potential disputes: whether the Complainant's written medical restrictions in 1988 were appropriate to his condition; and, if so, whether the Front Dash Sealer Job complied with them. An internal GM e-mail dated 10-03-88 (EX 23-25 (F)) states "after investigating it was found that there is no change in the time or movement to complete the job assignment". Additionally, the Complainant's medical examination on November 17, 1988 indicated that he was immediately fit to return to work with the same restrictions as before (EX 23-25 (L)). Only a few days later on November 21, 1988, a letter from the Complainant's personal physician indicated that he was not fit for assembly line work and should work in an office (EX 23-25(M)). A later GM e-mail authored by Cowling reports that the Complainant was claiming to be totally disabled, yet was working for a realtor (EX 23-25 (P)). Internal GM documents also suggest that the Complainant failed to attend a scheduled medical examination in January 1989 (EX 23-25(Q)). An independent medical opinion of the Complainant's condition dated March 7, 1989, indicates that he would be suitable for an "office-type" job.

In July, 1989, the Complainant picketed in front of the Van Plant, indicating that he had been treated unfairly by GM in two respects: the failure to assign him to a light duty or desk job; and the failure of GM to recognize and reward him in accordance with the Suggestion Box program which provided incentives for employees to recommend cost-saving measures. The Suggestion Box issues date back to 1983. GM and Cowling assert that the Complainant's dissatisfaction with GM's treatment of his suggestions is at the heart of his human rights complaints. Other than through the picketing, the Complainant did not raise the issue of his placement: he never filed a grievance or pursued a complaint through the internal joint union-management human rights process.

There is further documentation (EX 23-25(T)) chronicling a meeting on July 21, 1989 attended by Monteith, the Complainant and two Local 303 officials, at which arrangements were made for the Complainant to undergo a medical examination to have his restrictions updated, following which a job search would be conducted based on those restrictions. The restrictions documented at that time in EX 23-25 (V) are the same as the earlier ones, with the addition of the phrase "not to work on assembly line".

Between August 1, 1989 and September 1, 1989, the Complainant and Cowling toured the entire plant, viewing every job to determine if there were any that the Complainant could identify as suitable to his medical condition. The only ones the Complainant identified pursuant to this search were not available to him on account of his relatively low seniority. At least two documents authored by Cowling indicate that the Complainant really wanted to return to the Material Control Job he had formerly held (EX 23-25(XYZ)) and EX 23-25(II), and that Cowling told him that the current incumbent was also partly disabled and had greater seniority than the Complainant.

Contemporaneously with the commencement of the job search, the Complainant made his initial contact with the Commission on August 2, 1989. The Complainant made regular written reports to Rod Io, The Commission Intake Officer, during the course of the job search. In three of those reports, dated August 17, 1989 (EX 23-25(DD)), August 21, 1989 (EX 23-25(EE)), and August 25, 1989 (EX 23-25(FF)), the Complainant claimed that he had difficulty keeping up with Cowling and that he became tired and winded by three hours of job search.

3. The 1990 Complaint

i. Intake

The Complainant completed an intake questionnaire in respect of his complaint on September 22, 1989. In it the Complainant identified his ground of complaint as handicap and GM, the CAW and Local 303 as the organizations about which he was complaining. He did not identify Cowling or Freeman as persons about whom he was complaining. As a remedy, he indicated that he was seeking

retirement benefits and lost wages and that he was "not able to ever return to work according to his doctor's advice."

Rather than completing the remainder of the questionnaire, which would have required identification, among other things, of potential witnesses and particulars of the complaint, the Complainant attached a lengthy narrative. To this document the Complainant further appended a number of documents including the second edition of his "So the public may know" manifesto and two medical notes. The first, a November 18, 1987 letter from his physician written while he was working in the Paint Touch-Up job, concludes "I don't think that medically he is suitable to work on the assembly line and it is my recommendation that he should go back to light duty." The second dated March 7, 1989, referred to above, recommends the Complainant be placed in an "office-type" job.

ii. The Formal Complaint

A formal human rights complaint was signed by the Complainant on October 2, 1990. It named only GM and Cowling as respondents. In the 1990 Complaint, the Complainant alleges that the Material Control Job was medically appropriate, but that he was removed from it without explanation. He also alleges that the Paint Touch-Up Job and the reorganized Front Dash Sealer Job exacerbated his medical condition, and refers to the unsuccessful job searches conducted on his behalf.

GM and Cowling responded to the 1990 Complaint on February 4, 1991. In addition to denying the merits of the claim, they sought to have the Commission dismiss it outright on two grounds: that it was frivolous and vexatious; and that it was based on events that had occurred more than two years previously. On June 27, 1991, the Chief Commissioner advised that the Commission declined to deal with the complaint on the ground that it was trivial and frivolous.

iii. Reconsideration

The Complainant sought reconsideration of the Commission's June 27, 1991 decision. The Reconsideration Report that the Officer provided to GM and Cowling for their comments was incomplete in that it failed to include documents attached to the internal copy. These documents

contained information provided by the Complainant respecting the state of his health, and comments from the Officer respecting the propriety of GM's treatment of him (EX 29). GM and Cowling thus had no opportunity to address these issues. By letter dated June 30, 1992, the Chief Commissioner advised the Complainant that his reconsideration request had been granted.

iv. Investigation

The Commission's investigation of the 1990 Complaint was suspended during the reconsideration deliberations. On July 30, 1992, the matter was assigned to Valerie Pollak (then Thoo). She was the Human Rights Officer responsible for investigating all human rights complaints in which GM was a respondent. Her Record of Investigation indicates that she spoke with the Complainant on August 10, 1992, and advised

> . . . that officer will be starting investigation immediately and hope to complete it either this or next month. Complainant said unable to work but would like his pension.

Pollak interviewed ten individuals between mid-October 1992 and early February 1993. They included the Respondent Cowling; several union and management representatives involved in the administration of placement procedures, including Dave Freeman; and persons who were or had been supervisors in the various departments in which the Complainant had worked. No rank and file employees were interviewed.

While her investigation was ongoing the Van Plant was closed. GM's intention to close the plant had been announced in October, 1989 and the shutdown actually occurred on May 7, 1993. Pollack had known of the impending closure since at least September 1990 when the Complainant wrote to the Commission expressing concern about what impact the plant closure would have on his complaint (EX 23-10).

The Record of Investigation indicates that Pollak's Case Summary was prepared on February 9, 1993. The Case Summary concludes:

> In summary, it appears that the Complainant was not treated any differently by the Respondent because of his disability. However, the issue still remains as to whether a seniority clause in a collective agreement can be used in the accommodation of a disabled worker.

The Case Summary was provided to GM and Cowling. On April 6, 1993, they responded to it, saying, in part, "the facts of this case do not disclose or demonstrate any deviation from the terms of the collective agreement". On April 15, 1993, the Complainant, through his solicitor, responded to both the Case Summary and the Respondents' comments, raising for the first time the issues of whether the Front Dash Sealer Job was within his medical restrictions at the time he was placed in the position, and whether women less senior than he were performing jobs he could have performed.

The Officer's Comments on the Parties' Submissions states:

> . . . there is no evidence to show the Complainant was directly discriminated against because of his handicap. The biggest issue here is one of seniority and whether this can be used by both employers and unions as a reasonable barrier to the accommodation of disabled employees. Given that seniority is the cornerstone of collective agreements, this matter is on that must be dealt with at a Board of Inquiry.

Pollak's Recommendation to the Commissioners essentially repeats this analysis.

On October 25, 1993, the file was returned to Pollak for more work. She was specifically instructed to "cite Union as a Respondent " and to resubmit the file in three months.

4. The 1994 Complaints

After the 1990 Complaint was returned to Pollak, counsel for the Complainant drafted new complaints. One named GM and Cowling as Respondents. The other named Local 303 and Freeman as Respondents. Both were executed by the Complainant on January 26, 1994. The 1994 Complaints were served on all Respondents by March 1, 1994. Notwithstanding that the body of each complaint is identical, the GM/Cowling complaint was not copied to Local 303 or Freeman, and the Local 303/Freeman complaint was not provided to GM or Cowling.

Ryan testified that Local 303 first became aware that the Complainant was alleging it had engaged in discriminatory conduct when the 1994 Complaint was served upon it. Prior to that, Local 303 had some knowledge that a complaint was outstanding as against GM. In January 1992, the Complainant attended a meeting with Ryan and Local 303 representatives Roger Kennedy and Jim Legge. Ryan's recollection of this meeting, reflected in notes taken at the time, was that although the Complainant indicated he was proceeding with a complaint against GM, he refused to discuss the particulars of the complaint without speaking to his counsel.

Although they cover the same time period as the 1990 Complaint, the 1994 Complaints contain several new allegations. Specifically the 1994 Complaints allege:

- the creation of seven new permanent jobs in Material Control after the Complainant had been transferred from that department, but which he could have performed;
- the existence in the Trim Department of jobs compatible with the Complainant's medical restrictions and held by less senior female employees; and
- the initial and ongoing unsuitability of the Front Dash Sealer Job to his medical restrictions.

The 1994 Complaints do not identify the incumbents in the disputed Material Control positions or the less senior female employees who occupied the Trim Department positions.

5. The Processing of the 1994 Complaints

As they had done with the 1990 Complaint, GM and Cowling once again sought early dismissal of the 1994 Complaint. It does not appear that the Commission ever specifically dealt with this request.

Valerie Pollak immediately commenced preparing her Case Summary and investigation.

With respect to the complaint against Local 303 and Freeman, the Record of Investigation indicates that Valerie Pollak spent 40 minutes interviewing Jim Legge (28/03/94); 30 minutes speaking to Ryan on the telephone (25/04/94); 25 minutes speaking to Freeman on the telephone (14/03/94); and 10 minutes speaking to Lindsay Anderson on the telephone (1/05/94). In cross-examination, Pollak conceded that she made no effort to investigate the merits of any defence that Local 303 may have

had to the 1994 Complaint, by, for example, considering whether circumstances existed where further accommodation of the Complainant necessitating disregarding seniority provisions might have amounted to "undue hardship".

Pollak took no steps to investigate the 1994 Complaint as against GM and Cowling.

Following her investigation, in her Case Analysis dated May 5, 1994, Pollak concluded

> . . . there is no evidence to indicate that the Complainant was discriminated against by any of the named Respondents because of his handicap. On the contrary, the evidence shows that it was difficult, if not impossible to place the Complainant in a job at a company where virtually all of its jobs are assembly line work, due to his relatively low seniority level and severe medical restrictions. However, counsel for the Complainant has argued that the seniority provision cannot be used by the Respondent as a bar to providing accommodation for a disabled Employee. This, the Officer submits is a matter which should be dealt with at a Board of Inquiry.

Earlier in her Case Analysis, Pollak had concluded that the seven new Material Control jobs were not within the Complainant's medical restrictions, that there was insufficient evidence of less senior female employees performing Trim Department jobs within his restrictions, that the Front Dash Sealer Job had been within his restrictions, and that the 1989 job search was properly conducted. The Complainant and his solicitor, in separate submissions, took issue with the conclusions in respect of the Material Control jobs, and with respect to the Complainant's treatment in the Front Dash Sealer Job.

Pollak recommended the appointment of a board of inquiry , and the Commissioners at their meeting on October 4, 1994 decided: "Board approved on issue of lack of accommodation because of handicap only." (EX 24-51 and 24-51A)

6. The Individual Respondents

Pollak testified that her investigation revealed no evidence that either of the individual Respondents had directly discriminated against the Complainant. They had, however, been involved in the administration of the Local and Master Agreements, pursuant to the terms of which the Complainant alleged he had been removed from the Material Control Job and found not to be entitled to other jobs he claimed to have been capable of performing. According to Pollak, Cowling and Freeman were named as Respondents because, although their actions may have been dictated by the policies specified in the collective agreement, they were still the individuals who took those actions.

7. Referral to the Board of Inquiry and Decisions on Preliminary Motions

Under the statutory scheme then in place for the referral of complaints, on October 13, 1994 the Chief Commissioner wrote to the Minister of Citizenship, indicating that the Commission had decided "that a Board of Inquiry should be appointed in the above-noted case with respect to discrimination in employment on the basis of handicap, **specifically that the respondents failed to accommodate the needs of the complainant short of undue hardship**" (emphasis added) and requesting that the Minister appoint a Board. By letter dated December 16, 1994, the Minister appointed Dr. Naresh Agarwal to hear and decide "the above mentioned complaint", which complaint was identified as follows in the re: line of the letter: ". . .in the matter of **the complaint dated January 26, 1990**, by Oscar Anonuevo naming as respondents General Motors of Canada Limited, Pat Cowling, Canadian Autoworkers' Union (CAW) Local 303, and Dave Freeman" (emphasis added). Of course, there was no complaint dated January 26, 1990: there was the 1990 Complaint against GM and Cowling, dated October 2, 1990; and there were the 1994 Complaints against GM, Cowling, Local 303 and Freeman, dated January 26, 1994.

Agarwal commenced the hearing by conference call and several days of oral hearing were scheduled. On May 10, 1995, prior to the first day of oral hearing, the Complainant died. Several letters were exchanged among Commission counsel, counsel for GM and Cowling, and counsel for Local 303 with respect to the effect the Complainant's death had on the proceedings. The Complainant's Estate wished to pursue the 1994 Complaints. By this time, counsel for GM and Cowling had also indicated

an intention to rely on the misidentification of the date of the complaints in the Minister of Citizenship's letter of referral as constituting a jurisdictional impediment to Agarwal's hearing the matter.

The Commissioners met on June 20 and 21, 1995, and decided to proceed with the hearing notwithstanding the death of the Complainant. This decision was made without the benefit of any submissions from counsel for the Respondents as contained in their exchange of correspondence with Commission counsel. By this time the statutory scheme for referrals had changed. No longer did the Commissioners request the Minister of Citizenship to appoint a board of inquiry. Instead, they communicated their referral directly to the Chair of the Board of Inquiry who assigned the case to an adjudicator. The Commissioners referred the 1994 Complaints to the Chair. On June 22, 1995, the Chair assigned Agarwal to hear them.

Several preliminary motions were argued before Agarwal. He disposed of them as follows in his decision dated December 27, 1996 ("the Agarwal Decision").

(1) the motion to dismiss the proceedings for lack of jurisdiction on the grounds that the Commission had not satisfied the statutory prerequisites to referring the matter was dismissed;

(2) the motion to dismiss the proceedings for lack of jurisdiction on the grounds that the 1994 Complaints raised matters within the exclusive jurisdiction of a labour arbitrator or the Labour Relations Board was dismissed;

(3) the motion to add the CAW as a party respondent was granted;

(4) the motion to dismiss the 1994 Complaints as untimely in contravention of the Limitations Act was dismissed;

(5) the motion to dismiss on the grounds that the 1994 Complaints could not be pursued following the death of the Complainant was dismissed;

(6) the motion to dismiss the 1994 Complaint as disclosing no prima facie complaint as against the Respondent Pat Cowling was dismissed;

(7) the motion to strike certain paragraphs in the particulars filed by the Commission after the Complainant's death on the grounds that they raised new allegations and broadened the 1994 Complaints was dismissed; and

(8) the motion that the Respondents provide the Commission and the Complainant with certain documentary disclosure was granted.

Subsequent to the release of the Agarwal Decision, Agarwal indicated his intention to resign as the adjudicator. The Chair wrote to the parties seeking their submissions on whether he ought to reassign the matter. On April 11, 1997, he wrote to the parties indicating that he had decided to reassign the matter.

On May 2, 1997, GM and Cowling brought an Application for Judicial Review of the Commissioners' referral; the Agarwal Decision; and the Chair's reassignment of the case. The CAW and Local 303 filed a virtually identical judicial review application dated November 12, 1997.

Still outstanding at the time of my assignment were motions by the Respondents (with the exception of Freeman) to have the complaints stayed or dismissed as against them on the grounds that they constitute an abuse of process. In the interests of avoiding a duplicity of proceedings, the parties agreed that I should hear and decide these motions before the hearing of the judicial review application. Counsel for the CAW and Local 303 indicated his preference that a block of days be set for the hearing of the motions to accommodate his witness Ryan, who now resides in Newfoundland. Oral hearings were scheduled for September 29 and 30, October 1, November 10 and 12, 1997, and the parties were reminded that they were to exchange lists of witnesses at least two weeks in advance of the first scheduled day of hearing.

On September 23, 1997, the Commission served notice that it would be making a motion for an order that the Respondents disclose certain documents. Submissions on this motion occupied the entirety

of the day on September 29, 1997. My order for disclosure was communicated to the parties by facsimile transmission at 5:00 p.m. the next day, with written reasons to follow (which were provided on October 6, 1997). On October 1, 1997, the Commission requested an adjournment so that it might obtain and review the documents prior to the hearing of the abuse of process motions. All parties consented to the adjournment, although the CAW and its Local 303 requested that I impose a condition on it, namely, that the Commission reimburse it for the expenses incurred in arranging for Ryan's attendance. I granted the adjournment, but reserved on the CAW's request and directed the parties to provide me with written submissions on the issue of my jurisdiction to make such an order.

Five additional hearing days between December 1 and 9, 1997 were set. I undertook to render a decision on the motion with sufficient dispatch thereafter to enable any party to include a challenge to it with the judicial review application then scheduled for January 27 and 28, 1998. As it turned out, the parties were not able to complete their legal submissions in December. Consequently, the parties attended before me on January 27 and 28, 1998 and the judicial review application was rescheduled to June 10, 11 and 12, 1998. At the request of the parties, I agreed to stay any further proceedings until the Divisional Court renders its decision on the judicial review application.

8. The Conduct of the Litigation

i. Communication with Witnesses

On April 18, 1995, Commission counsel wrote to Monteith in respect of matters pertaining to the Complainant's continuing entitlement to long term disability benefits. The Commission subsequently provided that letter to counsel for GM as an enclosure to another letter dated April 24, 1995. By letter dated May 2, 1995, counsel for GM replied, objecting to the fact that the Commission had communicated directly with his client:

> . . . you . . . have repeatedly been notified that General Motors of Canada Limited has retained counsel and that all correspondence in respect of Oscar Anonuevo and the Human Rights Commission ought to be addressed to [counsel for GM] . . . . I am prepared to listen to any possible justification you may care to advance to support your office's flagrant attempt to circumvent my client's right to legal representation.

William Holder was a student-at-law fulfilling his articles of clerkship at the Commission in 1994 and 1995. He was familiar with the subject matter of the 1994 Complaints. When the Commission retained a law firm to represent it in connection with the complaints, Holder obtained part-time employment with that law firm while he was enrolled in the Bar Admission Course. In that capacity, he assisted in the preparation of the Commission's case for hearing. On November 16, 1995, Holder contacted a GM employee, Lindsay Anderson, with the intention of obtaining a witness interview with him. Anderson had previously been interviewed by Pollak during the course of her investigation. Holder did not obtain an interview with Anderson, who indicated that he wished to check with counsel. On November 22, 1995 counsel for GM wrote to counsel for the Commission, taking exception to the fact that Anderson had been contacted directly rather than through counsel for GM, and requesting an explanation. The Commission did not respond to that letter, nor to a follow-up letter dated November 30, 1995. On September 22, 1997, however, Holder swore an affidavit with respect to these matters, and it was provided to all other parties in these proceedings. Holder attended the hearing and was cross-examined on December 4, 1997.

ii. Disclosure

Pollak testified on December 4 and 8, 1997. In the course of her testimony it became clear that the Commission had not disclosed the entirety of its file to the Respondents. One of the documents that was produced for the first time during Pollak's testimony was a letter dated January 7, 1992 from the Complainant to the Commission urging that they expedite his case because his health was deteriorating quickly and irreversibly, and because of the impending closure of the Van Plant. This letter was included as an attachment to a memorandum from Ashworth Williams in the Commission's Office of Reconsideration to Lesley Lewis, the Commission's Executive Director. The memorandum concluded: "It would seem to me that the letter speaks to the prudence of the respondent's decision to place Mr. Anonuevo on long-term disability benefits."(EX 29)

Also disclosed for the first time during Pollak's testimony was the fact that the 1994 Complaints were drafted by the Complainant's counsel, rather than by Commission staff. Disclosure of the entire Commission file would have revealed this fact.

iii. Particulars

The Respondents GM and Cowling first requested particulars of the 1994 Complaints from the Commission by letter dated December 14, 1994 (EX 15-4), at which time the Commission had not yet retained outside counsel, although it appears to have done so shortly thereafter. On March 14, 1995 counsel to the Commission provided GM and Cowling with a draft agreed statement of facts (EX 15-6). It contains several new allegations pertaining to the period of the Complainant's active employment for GM, and also contains three paragraphs relating to his treatment subsequent to the 1989 job search:

> 75. After one year on Sickness and Accident Benefits, Mr. Anonuevo was placed on Extended Disability Benefits. Mr. Anonuevo remains on these benefits to this day.
>
> 76. Mr. Anonuevo made attempts to work outside of General Motors (for example, at N.R.S. Esprit Realty Inc. and American Express Can. Ltd.), but was told by Pat Cowling that he would be ineligible for benefits if such employment continued. For fear of permanently losing his benefits, Mr. Anonuevo quit his job. Mr. Anonuevo is presently not employed.
>
> 78. In May of 1993 operations at the Scarborough plant of General Motors ceased. Most employees were transferred to the Oshawa plant. Mr. Anonuevo was advised that he would be "transferred" to the Oshawa plant of General Motors, however this transfer was merely for administrative purposes in order that he would continue to be recognized as an employee of General Motors, notwithstanding the fact that he was on long term disability leave from the Scarborough plant.

Counsel for GM and Cowling responded by letter dated March 16, 1995, indicating that the draft agreed statement of fact did not satisfy his request for particulars. An exchange of correspondence ensued in which the Commission took the position that it had sufficiently particularised the 1994 Complaint. In addition, in a letter dated June 1, 1995, GM and Cowling raised the issue of the new allegations which appeared for the first time in the draft Agreed Statement of Facts prepared by the Commission. By letter dated June 5, 1995, the Commission provided a Statement of Particulars and documentary production to the Respondents (EX 15-19). Paragraphs 27 - 35 of the Statement of

Particulars allege that the Complainant was ready, willing and able to work during the post job-search period; that there were jobs in the Van Plant he was capable of performing; that he was not notified of those jobs in contravention of the *Code* and the Local and Master Agreements; and that they were filled in some cases by employees with lesser seniority. By letter dated June 6, 1995, the Commission advised the Respondents that

> . . . the Statement of Particulars which has been delivered is the Commission's final Statement of Particulars. We had previously delivered a draft Agreed Statement of Facts for your review and indicated that that could also serve as our Statement of Particulars. That draft Agreed Statement of Facts had been reviewed and approved by the complainant. As a result of the death of Mr. Anonuevo, we have reviewed the case to determine which allegations we will pursue. These are now set out in the Statement of Particulars delivered to you. These Particulars, obviously, have not been reviewed by the complainant. (EX 15-21)

The assertions in the June 5, 1995 Statement of Particulars that the Complainant was ready, willing and able to work in the post-complaint period appear to be partially supported (at least as far as ability to work is concerned) by the medical report of Dr. G. Vertes, prepared on March 22, 1995 in respect of an examination of the Complainant that occurred a year earlier. This medical report was provided to GM for the first time on April 24, 1995.

The assertions in the June 5, 1995 Statement of Particulars that jobs in the Van Plant that the Complainant was capable of performing were in some cases filled by employees with less seniority appear to relate to the operation of the so-called "Broom Crew", which involved the temporary placement of some workers on light duties. Local 303 filed a grievance in respect of the operation of the Broom Crew. The grievance was settled on a without prejudice basis. New placement procedures were implemented sometime thereafter.

Following the Agarwal Decision, the Respondents made additional requests for particulars. Counsel for GM and Cowling did so by letter dated July 10, 1997. For the most part, his requests sought to have the Commission identify each instance when it said the Respondents could have but failed to place the Complainant in a job within his medical restrictions, what medical restrictions it viewed as the appropriate ones at that time, and to identify the employees who occupied the

position(s) it said complied with those restrictions. On August 26, 1997, counsel for the CAW and Local 303 also sought to have the Commission further particularize which jobs it was asserting that the Complainant was physically able to perform, and, with respect to the various impugned actions of the CAW, which officer, agent or official of the CAW acted on its behalf (EX 16-25). The corollary particulars with respect to persons acting on GM's behalf were sought in a letter dated September 4, 1997 (EX 16-20).

On September 11, 1997, the Commission replied to the Respondents' letters (EX 16-26). The Commission's position was that it was not obliged to provide the particulars as they could have been sought at an earlier date. Nevertheless, some particulars were provided. The Commission did not, however, identify any of the employees who occupied the seven new positions in Material Control, nor the identity of the employee who replaced the Complainant in the Material Control Job, stating that these were within the knowledge of GM. Similarly, the Commission refused to identify the jobs the Complainant was capable of performing, stating that these were within the knowledge of the Respondents. The Commission refused to specify its position with respect to how the Respondents might reasonably have accommodated the Complainant without undue hardship, stating that that issue was a matter for argument. The Commission prepared a document entitled "Amended Particulars" dated September 1, 1997.

iv. Individual Respondents

Upon receipt of the Statement of Particulars in June 1995, counsel for Cowling asked that the 1994 Complaint be withdrawn against him, on the basis that it contained "no allegations of a breach of the Code as against Mr. Cowling." The Commission responded by offering to withdraw the complaint on terms:

1) General Motors admits that Mr. Cowling acted at all times within his authority on behalf of General Motors;

2) you undertake to call Mr. Cowling as a witness at the hearing; and

3) General Motors admit to the authenticity of the documents authored by Mr. Cowling and which are contained in the documents disclosed by the Commission.

At the conclusion of argument, I asked the Commission to advise whether it would proceed with the 1994 Complaints as against any remaining Respondents, in the event that I dismissed or stayed the proceedings against others. In particular, I noted that the Respondent Freeman was not a moving party and took no position. The Commission advised that if the 1994 Complaint was dismissed as against the CAW and Local 303, it would continue proceedings as against Freeman. Further, if the proceedings were dismissed or stayed as against the CAW and Local 303, the Commission would not revise the remedies sought against GM, which include remedies having a potential impact on the provisions of the collective agreements.

9. The Available Evidence

i. Documents

No documentary record of the job specifications (e.g. ergonomic demands etc.) exists for jobs in the plant, as they were performed from time to time. Further, the unchallenged testimony of Ryan and Monteith was that it is not now possible to ascertain from documentary sources which employees performed any particular job. Nor was it ever possible to do so from documentary sources alone, since the regularly-generated seniority and serial number listings only identified departments in which particular employees worked, and not the specific jobs they performed in those departments. The earliest seniority list available was generated April 23, 1992 (EX 23-25), well after the dates of the specific allegations raised in the 1994 Complaints. The serial numbers used to identify employees on some of the documents cannot be relied on to trace employee movements through the Van Plant because those numbers are not unique to individual employees. Once an employee leaves GM's employ, his or her serial number is not "retired" but is instead "reassigned" to a new employee. In addition, temporary transfers of employees to different positions or temporary placements of injured or disabled employees are not reflected in the seniority or serial lists. An accurate determination of who was performing what job on a particular day could only be ascertained from a record created by touring the plant on that day.

In addition to difficulties in ascertaining who was at work and on what jobs, there are also difficulties in ascertaining who was not at work and why. Although GM maintained records of employees absent over 30 days, they do not indicate the reason for the absence nor any specific medical restrictions subject to which the employee could return to work. No lists were ever kept of employees who might have been ill or injured and absent from the plant for less than thirty days. Accordingly, other than through personal recollection, it is not possible to ascertain which employees were absent, their seniority dates, and the medical restrictions (if any) to which they were subject.

Monteith testified that his understanding from the 1990 Complaint and from Pollak's investigation was that the Complainant's allegations with respect to GM and Cowling related only to incidents that occurred prior to his leaving the Front Dash Sealer Job in the fall of 1989. By the time GM was served with the 1990 Complaint and Pollak conducted her investigation, documents generated contemporaneously with those events had been destroyed. Documentation generated thereafter was not kept because it pertained to a period of time subsequent to the incidents alleged in the complaint. Monteith testified that a new seniority list was generated each month and the one from the previous month destroyed. Once annually a seniority list was preserved off-site, but was destroyed on the anniversary of its generation. Additionally, it was Monteith's testimony that lists of employees awaiting placement were routinely destroyed, and that only such portion of a seniority list as was particularly relevant to the placement of an individual worker would ever have been kept in that worker's file. Any temporary assignment records that were created were not kept beyond the duration of the assignment.

The Local 303 Plant Chair's office was located in the Van Plant. It contained all of the records that Local 303 maintained with respect to the administration of the collective agreements, or with respect to any other activities it undertook on behalf of its members. When the Van Plant closed, most of those records were destroyed. Local 303 either never did maintain or failed to retain any records it may formerly have held relating to the placement of injured workers. As well, prior to the plant closure, management and union representatives managed to settle all outstanding grievances but one, and to dispose of those files. None of those grievances involved the Complainant. Ryan testified

that had there been a complaint against Local 303 prior to the closure of the Van Plant, he would have reviewed files and taken steps to preserve any relevant documentation.

Ryan's evidence was that the procedure for placing injured or disabled workers had changed over time, and that the best evidence with respect to what the procedures where at any given time would come from persons involved in their application at the time. Ryan himself was involved at one point in the placement of workers who had been absent from the plant for more 30 days. He testified that he called workers on the list to see if they were able and willing to come back to work because in some cases it was possible to find jobs that they could perform, even though their doctors had pronounced them "totally disabled". He kept no notes of his conversations.

In the absence of documentation respecting critical matters, *viva voce* testimony assumes a greater importance. I turn now to the evidence relating to the availability of witnesses.

ii. Witnesses

There was no evidence that either Local 303 committeemen involved in the administration of the collective agreements, or placement representatives for GM and Local 303 (with the exception noted below) are unavailable to testify in these proceedings. Whether they can recollect accurately any involvement they may have had with the Complainant, however, is unclear. They will, for the most part, not have the benefit of documents with which to refresh their memories.

The earliest allegations in the 1994 Complaints relate to events that occurred in 1987 -- the Complainant's placement in and subsequent removal from the Material Control Job, and the creation shortly thereafter of several new jobs in the same department. Even at the time of Pollak's investigation of the 1990 Complaint, the identity of the employees who secured those new jobs could not be ascertained. GM personnel estimated that those employees would have had at least twelve years seniority but, without knowing who they were, it is impossible to determine whether any of them were disabled or otherwise in need of accommodation. To the extent that there is a dispute

over the duties of those positions, it cannot be resolved by evidence from persons who actually performed the work.

Pollak's Record of Investigation with respect to the 1990 Complaint indicates that she made several unsuccessful attempts to contact Doug Cornell, who had been identified to her as having some responsibility for placement at the time the Complainant was placed on the Material Control Job (EX 24-27). In addition, Jim Gamsby is dead. Although Gamsby was interviewed by Pollak and claimed not to remember the Complainant, the Respondents assert that he placed the Complainant in the Material Control Job and was involved, along with the Complainant, in selling real estate while employed by GM on company time. The Respondents further assert that both Gamsby and the Complainant conducted such business from their desks in the Material Control Department, and that that is why the Complainant wanted to remain in the Material Control Job: the medical restrictions were just a means for him to obtain that end. These are not late-breaking assertions: there is some support for them in Pollak's notes of her interview with Rob Lafrance (EX 24-28). Gamsby might have been examined about these matters as well as about the demands of the Material Control Job.

Tom McDonnell was Local 303 President in 1987. He is also dead. Ryan testified that although the Local 303 President's duties did not normally make him as familiar as the Plant Chair and various committeemen with issues of the placement of workers, because the latter were absent from the plant and engaged in collective bargaining in the fall of 1987, McDonnell may have become involved with the Complainant in connection with his removal from the Material Control Job.

Ellie Eggert preceded the Complainant in the Paint Touch Up Job. She is now dead. The person who replaced him has not been ascertained. To the extent there remains any dispute about the duties of the Paint Touch Up Job and their appropriateness to someone with the Complainant's medical restrictions, it will be difficult, if not impossible, to obtain direct evidence from anyone who performed it. A further difficulty arises because no one has been able, even at the time of Pollak's investigation, to ascertain the identity of the Complainant's supervisor while he was performing the Paint Touch Up Job.

In the 1994 Complaints, the Complainant alleged that he identified five or six jobs he could perform that were held by less senior women. During her investigation, Pollak was unable to ascertain the identity of those women or the jobs they performed. It is therefore not possible to ascertain whether they possessed less seniority than the Complainant. Nor is it possible to ascertain whether the duties of their jobs could be performed by someone with the Complainant's medical restrictions.

There is a dispute about whether the Front Dash Sealer Job was ever appropriate to the Complainant, given his medical restrictions. In his testimony, Monteith described how the job was performed, both before and after its re-organization. There may be other employees available who could offer similar evidence about the demands of this job. No one submitted that such evidence was not available. Obviously, to the extent that there is any conflict about the demands of this job, or any other, it is no longer possible to take a view of the Van Plant and observe it being performed. Nor is it possible, in North America at least, to take a view of any assembly plant utilizing similar technology and modes of production.

The Respondents also maintain that the Complainant's dissatisfaction with the reorganized Front Dash Sealer Job is attributable to the fact that the elimination of the ability to work ahead of the line precluded him from making phone calls in connection with his real estate transactions. This is an area in which co-workers might have been able to testify, and about which the Respondents could have examined the Complainant.

Dr. Gee was the Complainant's personal physician until late 1987, when he was succeeded in that capacity by Dr. Lee-Cheong. Dr. Gee was caring for the Complainant when he was placed in and subsequently removed from the Material Control Job. Dr. Gee is now dead.

iv. Evidence of the Complainant

As noted earlier, the Complainant died on May 10, 1995. Pollak did not interview him during the course of her investigation. He has never provided evidence under oath with respect to the matters

alleged in the 1990 Complaint or the 1994 Complaints, nor has he been subject to cross-examination by the Respondents in these or any other proceedings relating to the same issues.

No affidavits have been sworn by the Complainant. He did author several documents, which he signed, swearing the contents to be true. Several different versions of some of these documents exist in the file. For example, there are three different versions of the "So the Public May Know" manifesto, one simply bears the document title, but the others are identified as the first and second edition. Pollak testified that all three versions were provided to the Commission in the following order: the unattributed one, the second edition, and the first edition. She did not question the Complainant about the differences among these versions.

Ryan testified that at least one letter (EX 24-55) written by the Complainant, and indicating that it had been copied to Ryan, had not been seen by him prior to its disclosure in the Commission file. He also testified with respect to a meeting that the Complainant attended in his office and in respect of which the Complainant purported to prepare an account. According to Ryan, when he disputed the accuracy of the Complainant's account, the Complainant's response was to have his "minutes" witnessed by a Local 303 committeeman who had not even been in attendance at the meeting. Various different versions of these minutes were provided by the Complainant to the Commission.

A letter sent by the Complainant to the Commission on September 16, 1990 contains statements that Pollak lost documents from his file and that he had already signed a formal complaint, neither of which was the case, according to Pollak's testimony.

C. THE ANALYSIS

1. What is Abuse of Process?

Generally speaking, an abuse of process occurs where the party asserting a claim for which it seeks a judicial remedy fails to conduct him or herself with the expected propriety, thereby impairing the ability of the person defending the claim to do so effectively, with the result that the

integrity of or public respect for the decision maker would be undermined should the proceeding be allowed to continue. The doctrine is applicable in civil and criminal proceedings.

> Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits . . . but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court . . .It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfill its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. (*R. v. Conway* (1989), 49 C.C.C. (3d) 289 (S.C.C.), at p. 302)

See also *Lasani v. Ontario (Ministry of Community and Social Services) (No.1)* (1993), 21 C.H.R.R. D/412 (Ont. Bd. Inq.), at Para 11.

For the continuation of these proceedings to constitute an abuse of process, therefore, I must conclude that the Commission and/or Complainant has failed to act with the expected propriety, and that the impact of that behaviour on the Respondents impairs their ability to defend the 1994 Complaints to such an extent that those complaints should be dismissed or permanently stayed. Before entering on those inquiries, it is useful to review the legal principles applicable to abuse of process motions, as well as the specific context in which these motions arise.

2. Legal Principles Respecting Abuse of Process

The parties provided me with a number of authorities. From my review of them, the following principles emerge:

The Board of Inquiry has jurisdiction to dismiss or stay permanently a proceeding before it where to do otherwise would constitute an abuse of process. See *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22, as amended, s. 23(1); *Hollis Joe v. Ontario Human Rights Commission* (1995),

25 C.H.R.R. D/472 (Ont. Bd. Inq.), and cases cited therein at Para. 54; and *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Gen. Div.).

Abuse of process may be found where improper conduct occurs at either the litigation or the investigation stage of a proceeding. See *Patel v Minto Developments Inc. (No.2)* (1996), 26 C.H.R.R. D/444 (Ont. Bd. Inq.); and *Schofield v. Oshawa General Hospital* (1993), 20 C.H.R.R. D/391 (Ont. Bd. Inq.).

The jurisdiction to dismiss or stay for abuse of process should be exercised cautiously and only in the clearest of cases, particularly in view of the serious consequences to the complainant who usually has no access to another forum in which to assert his or her claim. See *Gohm v. Domtar Inc. (No. 1)* (1989), 10 C.H.R.R. D/5968 (Ont. Bd. Inq.), at Para 43199; and *Seneca College v. Bhadauria* (1981), 2 C.H.R.R. D/104 (S.C.C.).

The Board of Inquiry has no supervisory jurisdiction over the Commission. Its task is not to determine whether the Commission has exceeded or failed to exercise its jurisdiction by acting unfairly or failing to satisfy a statutory prerequisite. The Board may, however, be required to assess what lasting impact the Commission's handling of a case has had on the fairness of the proceeding before it and particularly on the ability of a respondent before the Board to make full answer and defence to the allegations against it:

> In my view, a board of inquiry has no general authority under the Code to determine if the jurisdictional prerequisites to the establishment of a board of inquiry have been satisfied. That responsibility lies with the courts -- either on judicial review or a motion to quash the appointment of the board of inquiry. Instead, it is only when a procedural error or omission, which cannot be rectified, amounts to an abuse of process, that a board has the authority to address the matter." (*Hollis Joe v. Ontario Human Rights Commission*, at Para. 30)

See also *Ontario College of Art v. Ontario Human Rights Commission* (1993), 11 O.R. (3d) 798 (Ont. Div. Ct.), at p. 800.

Where the unfairness complained of in the Commission's handling of the matter can be rectified by an order of the Board, such order will issue, but the proceeding will not be stayed. For example, in some circumstances the unfairness consequent upon a failure to provide particulars in a timely way may be rectified by the Board of Inquiry ordering their production and adjourning the proceedings pending their delivery. See *Jack v. Metro Toronto Reference Library* (1994) 22 C.H.R.R. D/158 (Ont. Bd. Inq.), at Para. 37 and 38; and *Clinton v. Ontario Blue Cross (No.1)* (1993), 18 C.H.R.R. D/375 (Ont. Bd. Inq.), at Para. 7. But *contra*, see *Hollis Joe*, at Para. 80.

The mere fact that the Commission has been dilatory in its investigation or prosecution of the complaint is not sufficient to constitute abuse of process. The respondent must demonstrate that it has suffered some actual substantial prejudice as a consequence of the delay. Contrary to earlier jurisprudence, a respondent need not show that it is impossible to ascertain the facts:

> The question is simply whether or not on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing. (*Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission*) (1995), 24 C.H.R.R. D/464 (Gen. Div.), at Para 16, citing *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man. C.A.))

In some circumstances, it will not be possible to assess at the outset the degree of prejudice that the respondent has suffered. In those cases, adjudicators have held that the appropriate course is to refuse to dismiss; to commence hearing the evidence on the merits; to entertain a subsequent motion to dismiss if necessary; to make any rulings possible to alleviate the prejudice that does exist; and to take the fact of delay into account in considering what weight to give the evidence. For examples of this approach, see *Aziz Chowdhury v. F.C. Israel* (unreported) (July 5, 1995, Ont. Bd. Inq.); *Crane v. McDonnell Douglas Canada Ltd.* (1993), 19 C.H.R.R. D/422 (Ont. Bd. Inq.); *Morin v. Noranda* (1988), 9 C.H.R.R. D/5245; *Ontario (Human Rights Commission) v. Vogue Shoes* (1991), 14 C.H.R.R. D/425 (Ont. Bd. Inq.).

3. Elements of a *Code* contravention

It is impossible to assess whether proceeding with the hearing of the 1994 Complaints would occasion an abuse of process without first identifying the elements required to found a complaint of discrimination in employment on the basis of handicap.

Generally speaking, the Board must be satisfied that:

- the complainant had a handicap;
- the named respondent either discriminated against the complainant directly; or constructively through the application of a neutral rule that had a differential impact on persons with a handicap;
- if the discrimination was constructive, the respondent failed to take reasonable steps short of undue hardship to accommodate the complainant; and
- the complainant cooperated in any attempts to accommodate him.

(*Central Okanagan School District No. 23 v. Renaud* (1992), 95 D.L.R. (4th) 577 (S.C.C.)and *Central Alberta Dairy Pool v. Alberta Human Rights Commission* (1990), 12 C.H.R.R. D/417 (S.C.C.))

Which of the above elements are disputed in this case?

I do not understand the Respondents to be disputing that the Complainant had a handicap within the meaning of the *Code*.

While the 1994 Complaints contain allegations of direct discrimination, it is clear from the evidence that the Commissioners decided to refer on the "issue of accommodation only", that is, on whether the Respondents constructively discriminated against the Complainant.

While this is not intended to be a comprehensive list, the following factual inquiries will have to be undertaken to resolve whether the Respondents constructively discriminated against the Complainant contrary to the *Code*:

- what were the Complainant's medical restrictions from time to time;
- were they communicated to the Respondents;
- what were the physical demands of the various jobs he was assigned to perform, and those which he maintained he could have performed;
- who occupied the jobs he said he could perform, but was not assigned to;
- what was their seniority;
- what other employees required placement;
- what were their medical restrictions;
- what was their seniority;

- were there any accommodation concerns with respect to the incumbents of the desired jobs;
- what options existed for accommodating him;
- did he refuse to accept reasonable accommodation; and
- how did the various accommodation options impact on the Respondents having regard to, *inter alia*, the list of concerns articulated by Wilson, J., in *Central Alberta Dairy Pool*:

> I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar -- financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation my influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted tot he circumstances. Where safety is at issue not the magnitude of the risk and the identity of those who bear it are relevant considerations. this list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case. (at Para. 63)

4. Propriety of the Commission's Conduct

i. Fairness

The Commission owes a duty of fairness to those whose actions it investigates:

> . . . the duty of fairness when dealing with an investigative body is to inform an interested party of the substance of the case against it and allow an opportunity for responding representations or submissions. There is not requirement to disclose the whole file, but a duty to provide a fair summary of the relevant evidence. (*Federation of Women Teachers' Association of Ontario v. Human Rights Commission (Ont.)* (1988), 30 O.A.C. 301 (Div. Ct.), at Para. 52)

See also *Commercial Union Assurance v Ontario (Human Rights Commission)* (1987), 59 O.R. (2d) 481 (Div. Ct.), at p. 486, aff'd (1988), 63 O.R. (2d) 112 (C.A.).

The Respondents contend that the Commission breached its duty of fairness by failing:

- to provide the CAW and Local 303 with timely notice of the Complainant's allegations against them;
- to disclose to GM and Cowling all of the Reconsideration Report;
- to deal specifically with the Respondents's requests that the 1990 and 1994 Complaints be dismissed as untimely;
- to investigate any defences Local 303 may have had to the 1994 Complaint by inquiring into the *indicia* of undue hardship; and
- to put the Respondents' submissions with respect to the impact of the Complainant's death before the Commissioners when they met in June 1995.

The Respondents also submit that the Commission's assertion of allegations in respect of events occurring after 1990 and its assertion of new allegations after the Complainant's death were in breach of its fairness obligations.

There is no doubt in my mind that the Commission acted in breach of its duty of fairness when it failed to give the CAW and Local 303 timely notice that their interests might be affected by the Complainant's complaint, and when it failed to give the Respondents a timely opportunity to make submissions on an issue the Commissioners were deciding. See *Ontario (Ministry of Health) v. Ontario (Human Rights Commission)*; *Schofield*; and *Drummond v. Tempo Paint and Varnish Co.* (1994), 24 C.H.R.R. D/341. With respect to the other actions that the Respondent would have me characterize as unfair, however, I agree with the opinion expressed in *Shreve v. Windsor (City)(No.2)* (1993), 18 C.H.R.R. D/363 (Ont. Bd. Inq.) at Para. 42. The Commission does not act improperly in failing to specifically address a request for early dismissal: one can conclude that the request was dismissed from the mere fact of the Commission's referral of the matter to a Board. Similarly, the Commission does not act improperly when it places greater emphasis during the investigation on whether a complaint can be made out than on assessing the availability to the respondent of any defences.

ii. Delay

The earliest of the incidents giving rise to these allegations relates to the Complainant's removal from the Material Control Job in 1987. He did not contact the Commission with respect to his

concerns until late 1989, and the 1990 Complaint was not executed for another year. Even then, the complaint only named GM and Cowling as respondents, notwithstanding that everyone involved knew or ought to have known that there were collective agreements in operation and the bargaining agent's interests were affected. This delay is attributable to the Complainant and to the Commission.

From October 2, 1990 until the Commissioners decided on October 4, 1994 to refer the 1994 Complaints, the processing of the Complainant's file was within the exclusive control of the Commission. There was no suggestion before me that any uncooperative behaviour or dilatoriness on the part of the Respondents contributed in any way to the length of time involved in its processing. This delay is attributable to the Commission.

This matter has now been at the Board of Inquiry stage for almost three and one-half years. This delay has been contributed to by all the parties and by the lengthy deliberations preceding the release of the Agarwal Decision.

I agree with the Board of Inquiry in *Morin* with respect to how to measure the time that has elapsed in this case:

> There is little doubt in my mind that the appropriate point for measuring time in relation to Commission delay in these proceedings should be from the date of the practices alleged to be discriminatory as set forth in the complaint. (at Para. 39526)

I further find that the period of the delay ends when the matter is referred to the Board of Inquiry. In this case, that occurred some seven years after the earliest alleged incidents. I appreciate that it takes time to complete complaint intake, investigate complaints and deal with requests for early dismissals and reconsideration, and that the time required to complete these things does not necessarily constitute delay chargeable to the Commission (See *Lasani*, at Para. 16). Nevertheless, in my view, the Commission's processsing of these matters from 1990 until 1994 was inordinately protracted, particularly in view of the fact that the Commission was aware that

the incidents alleged in the Complaint dated from 1987, and was also aware from at least September 1990 that the Van Plant would be closing and that the Complainant was concerned about the impact this event might have on his Complaint. With respect to the Respondents Local 303 and Dave Freeman, seven years had passed from the time of the first incidents before the Commission even informed them that there was a complaint against them. More than another year elapsed before the Commission sought to have Agarwal add the CAW as a respondent, even though it was responsible for negotiating the Master Agreement with GM.

iii. Failure to Disclose/Particularize

I referred in some detail earlier to the exchange of correspondence surrounding the Commission's furnishing of particulars in these matters, and noted that some allegations have yet to be particularized. It is a trite proposition that it is unfair to proceed to a hearing in respect of allegations that have been inadequately particularized. This situation can normally be redressed by way of an order adjourning the hearing if necessary and compelling the provision of particulars. See *Jack*, at Para. 37 and 38; and *Clinton*, at Para. 7. The Respondents made no such request to Agarwal or to me.

The Divisional Court in *Human Rights Commission (Ontario) v. House* (1993), 67 O.A.C. 72 (appl'n for leave to appeal dismissed), upheld a Board of Inquiry's order that the Commission disclose certain materials in its investigation file. That obligation was grounded on the principle that the "fruits of the investigation are not the property of the Commission" (at Para. 20), and that the role of Commission counsel, like that of the Crown in criminal proceedings, is not to obtain a conviction, but to bring forth relevant evidence.

The Commission file, most of which was disclosed on June 5, 1995, after the referral to the Board of Inquiry and after the Complainant's death, indicates that the Commissioners decided **not** to refer the issue of whether the Respondents had directly discriminated against the Complainant. The Board of Inquiry derives its jurisdiction from the Commissioners' referral. Although the documents constituting that referral are not normally provided to the Board of Inquiry or the

parties, the circumstances of this case suggest that the Commissioners should alter their practice in that respect.

Also disclosed for the first time during the hearing were the communications from the Complainant to the Commission respecting the state of his health as of January 7, 1992 (EX 29), and the fact that the Complainant's counsel had drafted the 1994 Complaints.

iv. Allegations respecting events after 1990

The Commission's position is that the Respondents had an ongoing duty to accommodate the Complainant, which did not cease upon the execution of the 1990 Complaint or the 1994 Complaints. On this basis, the Commission argues that the assertions in its final Statement of Particulars respecting the operation of the "broom crew" are not new allegations and are properly before the Board. I agree with the Board of Inquiry in *Gohm* when it says:

> I cannot understand how these amendments, which relate to a separate and distinct incident of alleged discrimination which occurred several months subsequent to the filing of the original complaints, could constitute further and better particulars of those original complaints. Although, as the Commission asserts, the complainant may not seek specific relief in respect of these incidents, that does not alter the fact that they concern a distinct and different incident and are, in substance, a fresh complaint. (at Para. 43202)

The "broom crew" assertions are not particulars, they are new allegations. And they are allegations that do not pertain to the issue of accommodating the Complainant from the rigours of the strict application of the Local and Master Agreements. Instead, these allegations are properly characterized as ones of direct discrimination -- colloquially speaking, the allegation is that the Complainant did not get placed even when placement did not occur on the basis of seniority.

v. Litigious Behaviour

GM and Cowling allege that the Commission acted unfairly and oppressively by contacting Monteith and Lindsay Anderson directly. For this allegation to succeed I would have to accept the proposition that Monteith and Anderson are clients of the law firm retained to represent GM. If they are not clients, then any party can talk to them: it is a trite proposition that there is no property in a witness. I heard no argument on this point, and I am not prepared to find that it constituted improper conduct.

More disturbing is the Commission's prosecution of the 1994 Complaints against the individual Respondents Cowling and Freeman; its offer to withdraw the 1994 Complaint as against Cowling in exchange for GM's agreement to certain conditions; and its stated intention to proceed against Freeman alone should the complaints be dismissed as against the other Respondents. These positions appear to be inconsistent with the Divisional Court's characterization of the role of Commission counsel as a non-adversarial one.

6. Prejudice

i. "Discrete" or "Cumulative" Approach

There appears to be some debate respecting the proper approach to cases in which a variety of "oppressive" actions are alleged to render abusive the continuation of the proceeding. Should one examine the effect of each such action discretely, or their combined effect? (See *Shreve* and *Chowdhury*). Although the outcome of this case remains the same regardless of which approach is utilized, in my view the better approach is to examine the combined effect of the actions. In *Shreve*, the Board of Inquiry concluded:

> In other words, taken separately, bias of the investigating officer, lapse of time, and restricted disclosure by the Commission would not necessarily, nor on the facts of this case, deprive the respondents of a fair hearing at the board of inquiry stage. In combination, however, these circumstances seriously prejudiced the ability of the respondents to prepare their case in a timely fashion. This violates the principle of fairness. It causes a prejudice that cannot really be cured at the board of inquiry stage since one power a board definitely lacks is that to turn back the clock. (at Para. 103)

That the *Shreve* approach is the appropriate one is supported by the decision in (*Ontario (Ministry of Health) v. Ontario (Human Rights Commission)* (1993), 105 D.L.R. (4th) 333 (Gen. Div.). Here, the court reviewing a decision of the Commission had to undertake a task analogous to that of the Board of Inquiry on these motions and decide whether to remit the matter to the Commission or terminate the proceedings. It held that:

> The court must consider the cumulative effect of the number of breaches by the Commission in this case of the requirements contained in its constituent statute. (at p. 340)

The Commission and the Complainant acted unfairly or oppressively towards the Respondents in a number of ways, as outlined above. Unless those actions resulted in substantial prejudice to the Respondents, however, permitting this hearing to continue is not an abuse of process. Below I assess the extent to which the Respondents have been prejudiced. Before addressing that matter, however, I want to deal with the Commission's argument that such assessment is premature.

ii. Prematurity

The Commission submits that the Respondents' motions are premature, because the prejudice to them cannot really be assessed until after all the evidence on the merits is heard. In support of this proposition, they cite *R. v. Francois* (1993), 15 O.R. (3d) 627 (C.A.), where the issue was whether an accused had been prejudiced by a delay that occurred prior to his being charged with an offence. The prejudice alleged was the loss of the opportunity to take timely steps to find and interview witnesses and confirm the accused's own recollection of events. The Court found that this alleged prejudice was "theoretical and speculative":

> The defence had full disclosure of the case for the Crown and had the "will say" statements of the Crown witnesses. There were no witnesses that had not been interviewed or could not be found. (at p. 629)

This case does not stand for the proposition that the degree of prejudice to a respondent can **never** be assessed on a preliminary motion. Instead, it is merely illustrative of the cautious approach to be taken to requests for early dismissal on the basis of abuse of process.

The Commission urged me to follow the example of the decisions in which adjudicators have refused to summarily dismiss a complaint as constituting an abuse of process, but have instead proceeded to hear the evidence on the merits, while leaving open the possibility that the abuse of process motion might be renewed. See *Walter Hyman v. Sotham Murray Printing and International Brotherhood of Teamsters, Local 419* (1982), 3 C.H.R.R. D/617; *Chowdhury*; *Barber v. Sears Canada Inc. (No.2)* (1993), 22 C.H.R.R. D/409 (Ont. Bd. Inq.); *Baptiste v. Napanee and District Rod & Gun Club* (1993), 19 C.H.R.R. D/246 (Ont. Bd. Inq.); *Vogue Shoes*; *Morin*; and *Jack*. In all of these cases, the "impossibility" as opposed to the "significant prejudice" standard was applied to the determination of whether the hearing ought to continue, and the adjudicators suggested that they would make allowances for any prejudice to the Respondents when they weighed the evidence. I confess to some difficulty understanding how this solution could be effective, except to the extent that the adjudicator was prepared to refrain from making adverse findings as to credibility on the basis of a witness' faulty memory. Certainly, however, it is not an appropriate solution here where the essence of the Respondents' assertions is that there is very little evidence they can adduce for me to give weight to.

iii. Loss of Available Arguments

As a result of the Commission's failure to disclose the entirety of its file in a timely way, the Respondents could not know that the Commissioners had referred the 1994 Complaints on the issue of accommodation only. Consequently, they lost the opportunity to have the Board expeditiously determine the preliminary matter of whether it had any jurisdiction to deal with the allegations of direct discrimination in the 1994 Complaints and Particulars.

Counsel for GM and Cowling argued that if he had known earlier that the Complainant's counsel drafted the 1994 Complaints, he could have relied on this fact in his motion to have Agarwal strike certain paragraphs of the particulars in answer to the Commission's submission

> . . . that complainants and the Commission staff who investigate their complaints are not experienced pleaders. A Board of Inquiry should not be handcuffed by the wording of the complaint or the report prepared by the Commission staff. (Agarwal Decision at p. 44)

The Respondents' legal defences or answers to both the issues of the Board's jurisdiction and the motion to strike were prejudiced by the Commission's failure to disclose.

iv. Disposal of Documents

A number of the factual inquiries that I identified as necessary for the proper adjudication and disposition of the 1994 Complaints simply cannot be undertaken. Most of the documentation that existed at one time has been destroyed. The Commission submitted that the Respondents cannot rely on their own failure to retain documentary evidence as constituting prejudice to ground an abuse of process motion. As a general propositon, the Commission's point is well taken, and I agree with the Boards of Inquiry that have so held (See *Lasani*). Here, however, all of the documents in issue were destroyed before the Respondents even knew a complaint had been made against them. In these circumstances, the Board of Inquiry's comments in *Hollis Joe* are apt:

> . . . the ability of a respondent to know in a timely fashion the case it must meet is crucial to a fair hearing. Although it is clear that a respondent has an obligation to secure and retain evidence, it must first know the case to meet. (at Para 65)

GM and Cowling's disposal of documents that were generated after the execution of the 1990 Complaint was not unreasonable in the circumstances. Those documents did not pertain specifically to the Complainant; they were disposed of in accordance with GM's established document retention and disposal policy; and, at the time of their destruction there had been no clear indication that the propriety of their treatment of the Complainant after 1990 was in issue or that the Complainant sought to return to work. Monteith's understanding, confirmed by Pollak, was that the core of the Complainant's concern was his removal from the Material Handler Job. Unlike the situation in *Entrop v. Imperial Oil* (unreported) (21 October 1994, adjudicator Backhouse), there is no evidence that the Commission ever gave the Respondents timely notice that it intended to argue that the Complainant's treatment post-1990 was part of the continuum of his complaint.

v. Death of Witnesses

The death of several witnesses also occasions prejudice to the Respondents, as set out in the facts. With the exception of the Complainant, none of these witnesses would normally be regarded as "key" witnesses. Because of the closure of the Van Plant and the loss of a great deal of documentary evidence (including job standards), however, the evidence of Gamsby and Eggert would have been "key" on the factual inquiry into the physical demands of the Material Control Job; the new jobs created in the department after the Complainant's removal; and the Paint Touch Up Job.

In support of the conclusion that the death of a key witness can constitute substantial prejudice, I rely on the Divisional Court's refusal to remit a matter to the Commission where a key witness died. In that matter the Court noted:

> There has certainly been inordinate delay between the first decision on September 21, 1984, and the second decision on February 17, 1986. There is very serious prejudice to the [respondents] . . . by reason of the death in 1985 of Louise Stafford, [the complainant's]. . . supervisor and a key witness. (*Commercial Union Assurance v. Ontario Human Rights Commission* (1987), 59 O.R. (3d) 481 (Div. Ct.), at p. 487)

vi. Death of the Complainant

The Agarwal Decision held that the hearing could continue notwithstanding the death of the Complainant. The same conclusion has been reached in several other cases: *Vogue Shoes*; *Baptiste*; and *Barber*. In the circumstances of those cases, the Boards of Inquiry held not only that the hearing **could** continue, but that it **should** continue. I am not revisiting Agarwal's conclusion that this hearing could continue, but I am dealing with whether it should continue given the death of the Complainant.

Had the Complainant's concerns been dealt with in a timely way by the Commission, there is every likelihood that he would have been alive to testify in these proceedings. Indeed, had the bargaining agent been named as a respondent at the outset, referral of his complaint would likely have occurred at least a year earlier. The Respondents claim that they are prejudiced by the death

of the Complainant because it deprives them of an opportunity to cross-examine him in a case where the record and the testimony of Ryan and Pollak indicate that the credibility of his statements is suspect and there is real confusion surrounding his medical state from time to time and the effect of various jobs upon it. They submit that this case is distinguishable from the cases cited above. I agree.

In *Barber*, the complainant was confined to a wheelchair and her allegations related to the fact that she could not gain unassisted access throughout the respondent's premises. Her husband had accompanied her on all her visits to the store and he was able to provide direct testimony on the central issue of access. In *Baptiste*, the complainant's allegations related to the fact that the respondents refused to accept his entry in a fishing derby because he did not hold a fishing licence, even though he was aboriginal and entitled to fish without a licence. The facts were largely undisputed, and the parties were able to conclude an agreed statement of fact. In *Vogue Shoes*, the complainant had also commenced a civil action for wrongful dismissal in respect of the same incidents she alleged in her human rights complaint, and the respondents had had an opportunity to cross-examine her during the examinations for discovery.

Most of the individuals interviewed by Pollak during the course of her investigation are alive and available to testify, but their recollection of events that occurred ten years ago may be vague. With respect to them, the Respondents find themselves in a strikingly similar position to that of the respondents in *Shreve*. The Board there found that the Commission's policy of not releasing the names of persons with knowledge of the incidents complained of until after a complaint had been referred for hearing was itself a reasonable one, but became oppressive when that referral was delayed:

> Such a policy would seem entirely fair in the context of a process that dealt with complaints in the prompt manner that I have outlined above. While it would deprive a respondent of some information important to the preparation of the case, this would only be for a temporary period. It is unlikely that any serious prejudice would result.

> On the other hand, when a respondent is left in the dark for years as to the identity of witnesses, its own opportunity to try to interview these witnesses, or other persons who may be able to provide another perspective on the same events, is hindered until memories of events may have significantly deteriorated. The Commission has the advantage of possessing witness statements prepared when memories were relatively fresh and which may be utilized to refresh these memories during the preparation of witnesses for the hearing. (at Para. 93 and 94)

vii. Cumulative Effect

There can be little doubt that the Commission's breaches of fairness and the delay with respect to the processing and investigation of these complaints occasioned real prejudice to the Respondents who were left in the dark with respect to facts that might have grounded some requests for relief on preliminary motions; disposed of documents they might otherwise have retained; failed to interview witnesses while their memories were fresh, or indeed, in some cases, while they were still alive; and failed to preserve job standards information or to take any steps to create evidence of how jobs were performed while the plant was still operating. This prejudice was compounded by the failure of the Complainant to particularize the allegations, and of the Commission to insist from the outset that he do so.

7. Can the prejudice to the Respondents be rectified?

I was not requested to order further particulars. Based on the testimony of Pollak respecting what she learned during her investigation, and on the fact that the Complainant is now dead, it is far from certain that the Commission would be able to furnish further and better particulars in any event. The dispersal of personnel, the disposal of documents and the closure of the workplace would undoubtedly create significant difficulties for the Respondents in their assessment of the validity of any particulars asserted. An order for particulars at this late date would not significantly alleviate the prejudice to the Respondents. The following comments from the *Hollis Joe* decision are apt:

> The record evidence shows that there are twenty to thirty job postings a year. The number of hiring decisions or upgrading requests in not in the record. But based on promotion decisions alone, there would be between 160 to 240 decisions from 1980 to 1988, and an additional 120 to 180 from 1988 to the present, assuming that

> this period of time is relevant, as the Commission asserts. In the absence of documentation concerning who applied for the positions and their background, who did the interviews and their interview notes, all of this information would depend on memory.
>
> . . . . .
>
> It is in this regard that the failure of the complainant to have timely filed his complaint, or even grieve the promotions he claims he was improperly denied, becomes problematic. Years passed with no reason for the respondent to suspect its decisions or actions would be challenged. Consequently, records were not retained and recollections of events were not recorded. Then, years after the events alleged to be discriminatory took place, a complaint is filed. This, in my view, is actual prejudice which detrimentally affects the respondents' ability to defend against the complainant's charges. (at Paras. 81 and 83)

Some of the oppressive aspects of the Commission's behaviour may be alleviated by an order striking portions of the 1994 Complaint and Statement of Particulars: the allegations of direct discrimination that the Commissioners did not refer; and the allegations pertaining to the "broom crew". *Hollis Joe* offers an example of the striking of allegations in appropriate circumstances. If I had not reached the conclusion that the 1994 Complaints must be dismissed in their entirety, I would have made an order striking the allegations of direct discrimination.

It may be that some of the prejudice attributable to the death of witnesses and loss of documents might have been avoided or alleviated had the Commission and the Complainant provided the Respondents with timely notice of the allegations, and once they had been reduced to the form of a complaint, timely particulars and disclosure. I have already noted above how the destruction of documents and closure of the plant makes *viva voce* evidence in this case more "key" than it might otherwise be. There is no order that I can now make that will bring back either the destroyed documents or the dead witnesses.

There is nothing I can do to relieve the Respondents of the prejudice occasioned to them by the death of the Complainant and the loss of the right to cross-examine him and test his credibility in areas where the evidence appears to conflict. The Respondents cited a number of cases for the proposition that it is inappropriate to make findings solely on the basis of hearsay evidence where

it conflicts with other evidence. They assert that all statements of the Complainant are hearsay, including the 1994 Complaints themselves, and that all the medical reports are based on hearsay -- what the Complainant told the doctors about how he was feeling. The Commission argues that the death of the Complainant is more prejudicial to the Commission's than to the Respondents' case, and cautions me against making a premature and inappropriate assessment of whether the Commission can make out a *prima facie* case of a *Code* contravention:

> In any case, it is the burden of the Commission to show a *prima facie* case. If they believe that even with the death of the complainant they can do this, then, in the absence of very strong evidence, to the contrary, it is incumbent upon me to allow them to proceed. (*Barber*, at Para. 24)

The Board in *Barber* concedes that there are circumstances where "very strong evidence" of inability to show a *prima facie* case could be taken that into account on a motion to stay or dismiss for abuse of process. After all, if the Board can be satisfied that no *prima facie* case can be made out because of the Complainant's death, what could be more abusive than requiring the respondents to sit through the Commission's evidence, only to bring a non-suit motion. I do not need to decide whether a *prima facie* case can be made out here, however, as there is already compelling evidence that the Complainant's death has caused substantial prejudice to the Respondents should this hearing continue. They are unable to examine him with respect to a number of critical issues, a partial list of which follows: his medical condition from time to time; what information he provided to the doctors who made recommendations respecting medical restrictions; what restrictions were appropriate to his condition from time to time; whether he asserts the Paint Touch Up Job was unsuitable and why; and why he asserts that the Front Dash Sealer Job was unsuitable and why.

CONCLUSION

The circumstances of this case are uniquely egregious. I find that to continue to hear it would constitute an abuse of process as against all the Respondents. The Commission has failed to adhere to the standard of conduct expected of it in both its investigation and prosecution of the

1994 Complaints. The Respondents' ability to mount a defence has been substantially and irremediably prejudiced as a consequence of the Commission's conduct.

The 1994 Complaints are hereby dismissed as against the moving parties. The Commission's stated intention to proceed against the individual Respondent Freeman in and of itself constitutes an abuse of process. The 1994 Complaint is hereby dismissed as against him as well.

I will continue to reserve on the outstanding issue of the request by the CAW and Local 303 that I require the Commission to reimburse them for the expenses associated with Ryan's attending on September 28, 1997 pending any submissions the Respondents make should they seek costs as against the Commission pursuant to s. 41(4).

Dated at Toronto this 31st day of March, 1998:

Mary Anne McKellar
Member, Board of Inquiry